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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, and WILLIAM SMITH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*	1
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	7
ARGUMENT	9
Relevant Statistical Proofs Must Be Given Appropriate Weight In Determining Discriminatory Impact and The Existence of Discriminatory Motive In Title VII Cases Alleging Disparate Treatment	9
A. The Historical Role of Statistics in Discrimination Cases	9
B. Protected Class Parity or Overrepresentation in An Employer's Workforce vis-a-vis the Relevant Labor Market is Strong Evidence of Fair Treatment in Hiring	11
CONCLUSION	18

AUTHORITIES CITED

Cases:

Alabama v. *U.S.*, 304 F.2d 583 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37	9
Barnett v. *W. T. Grant Co.*, 518 F.2d 543, 10 FEP Cases 1057 (4th Cir. 1975)	10
Castaneda v. *Partida*, 430 U.S. 482, 97 S. Ct. 1272 (1977)	8, 16
Dothard v. *Rawlinson*, 433 U.S. ——, 15 FEP Cases 10 (1977)	10
Hazelwood School District, et al. v. *U.S.*, 433 U.S. ——, 15 FEP Cases 1 (1977)	7, 8, 10, 13, 16, 17
Hill v. *Texas*, 316 U.S. 400 (1942)	9
Int'l Brotherhood of Teamsters v. *United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977)	3, 7, 8, 9, 10, 13, 17

AUTHORITIES CITED—Continued

	Page
Jackson v. *Nassau County Civil Service Commission*, 424 F. Supp. 1162, 14 FEP Cases 775 (E.D. N.Y. 1976)	14
Jones v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971)	10
Lightfoot v. *Gallo Sales Co., Inc.*, —— F. Supp. ——, 15 FEP Cases 615 (N.D. Cal. 1977)	12
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 5 FEP Cases 965 (1973)	8
Maldonado v. *Yellow Freight System*, —— F. Supp. ——, 10 FEP Cases 1290 (C.D. Cal. 1976)	11, 12
Mayor of Philadelphia v. *Educational Equality League*, 415 U.S. 605 (1974)	7
Neal v. *Delaware*, 103 U.S. 370 (1881)	9
Norris v. *Alabama*, 294 U.S. 587 (1935)	9
Patton v. *Mississippi*, 332 U.S. 463 (1947)	9
Peters v. *Jefferson Chemical Co.*, 516 F.2d 447, 11 FEP Cases 296 (5th Cir. 1975)	8
Presseisen v. *Swarthmore College*, —— F. Supp. ——, 15 FEP Cases 1466 (E.D. Pa. 1977)	12, 14, 16
Stewart v. *General Motors*, 542 F.2d 445, 13 FEP Cases 1035 (7th Cir. 1976), *cert. denied*, —— U.S. —— (1977)	7
Swain v. *Alabama*, 380 U.S. 202 (1965)	9
Turner v. *Fouche*, 396 U.S. 346 (1970)	9
United States v. *Hinds County School Board*, 417 F.2d 852 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970)	10
United States v. *Ironworkers, Local 86*, 443 F.2d 544, 3 FEP Cases 496 (9th Cir. 1971), *cert. denied*, 404 U.S. 984, 4 FEP Cases 37 (1971)	10
United States v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967)	10
United States v. *Louisiana*, 225 F.2d 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965)	9

AUTHORITIES CITED—Continued

	Page
Winston v. *Smithsonian Science Information Exchange, Inc.*, 437 F. Supp. 456, 15 FEP Cases 1280 (D.D.C. 1977)	13
Statutes:	
Civil Rights Act of 1866 (42 U.S.C. § 1981)	6
Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*)	2, 6, 7, 10, 13
Federal Executive Agency Guidelines on Employee Selection Procedures, 41 C.F.R. § 60-3.4(b) (1976)	15
Uniform Guidelines on Employee Selection Procedures, 42 Fed. Reg. 65542 (1977)	
Section 4(C)	15
Section 4(D)	14, 15
Miscellaneous:	
Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 Va. L. Rev. 463 (1973)	10
Morris, *Current Trends in the Use (and Misuse) of Statistics in Employment Discrimination Litigation*, EEAC (1977)	10, 15

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council (hereafter EEAC) moves this Court for leave to file the accom-

panying brief as *Amicus Curiae* in support of the the petitioner, Furnco Construction Corporation, in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of empolyers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council an unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—i.e., whether statistical evidence of lack of disparate treatment is relevant in a case alleging discriminatory treatment in hiring or other employment matters.

3. Because of its interest in issues pertaining to equal employment, the EEAC sought and was granted permission by this Court to file briefs as *Amicus Curiae* in a number of recent cases which raised serious Title VII issues. *See e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977); *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 14 FEP Cases 1505 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 14 FEP Cases 1510 (1977); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 14 FEP Cases 1697 (1977).

4. The movant *Amicus*, and its members, have broad knowledge concerning the type of Title VII issue involved here. Because of this knowledge and its extensive experience as *amicus curiae* in other Title VII cases, the *Amicus* is uniquely situated to brief this Court on the practical as well as legal aspects of the issues presented here.

5. Counsel for Furnco Construction Corporation have informed the movant that they have no objection to the granting of this motion. EEAC's brief *amicus curiae* agrees with Furnco that the decision of the court below improperly failed to consider exculpatory statistical evidence.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

STATEMENT OF THE CASE

Furnco engages in the relining of steel mill blast furnaces. In 1971 Interlake Steel contracted with Furnco to reline a Chicago blast furnace producing

two-thirds of Interlake's pig iron production there. Hiring for the job was done by a superintendent who was expected to select fire bricklayers of proven ability and competence. No hiring was done at the job gate, nor were applications taken there. The superintendent relied initially on a list of bricklayers who had shown their ability working on previous jobs. These men were all white. However, Furnco also had an affirmative action program designed to place 16% black bricklayers on the job, and pursuant to this program a number of black bricklayers were hired. All told, blacks worked 13.3% of the total man-days on the Interlake project. In comparison, Labor Department "Chicago Plan" data indicated that only 5.7% of all bricklayers in the relevant labor force were minority group members.

Respondents here filed suit under Title VII and 42 U.S.C. § 1981 challenging Furnco's failure to hire at the gate or take applications. The district court dismissed the suit finding the employer's hiring system a business necessity as the jobs in question required a high degree of skill due to the great potential danger from faulty workmanship, and the necessity to complete the job as soon as possible as Interlake had had to lay off about 70 employees during the relining and was suffering a loss of over $100,000 per day during the shutdown. The district court also found that because of the employer's affirmative action hiring efforts, there was no adverse impact on blacks, who in fact worked a much greater proportion of the Interlake project than their labor force representation (13.3% v. 5.7%). The court of appeals reversed. It specifically disregarded the statistics showing that the hiring system had no adverse impact on blacks

and ruled that Furnco's subjective hiring system was discriminatory. The court of appeals found that Furnco should have taken written applications, investigated these, and then made employment decisions.[1]

SUMMARY OF ARGUMENT

This Court reaffirmed only recently that "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339, 14 FEP Cases 1514, 1520 (1977) quoting *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1974). The *Amicus*, EEAC, believes that the decision of the court of appeals, which preceded this Court's decisions in *Teamsters* and in *Hazelwood School District* v. *United States*, 433 U.S. ——, 15 FEP Cases 1 (1977), ignored the important role of statistics in the defense of Title VII cases. For, although the Seventh Circuit has readily relied on statistics supplied by Title VII plaintiffs,[2] it discounted the effect of statistics here showing that the employer had utilized minority employees at a rate substantially exceeding their representation in the relevant labor market group. While the *Amicus* recognizes that this case is not a class

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[1] The decision of the district court is unofficially reported at 13 FEP Cases 1020 (N.D. Il. 1975). The decision of the court of appeals is reported at 551 F.2d 1085, 14 FEP Cases 865 (7th Cir. 1977).

[2] *E.g.*, *Stewart* v. *General Motors*, 542 F.2d 445, 13 FEP Cases 1035 (7th Cir. 1976), *cert. denied*, —— U.S. —— (1977).

action, we believe that the lower court's cavalier disregard for relevant statistics was inconsistent with the principles of *Teamsters*, *Hazelwood* and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 5 FEP Cases 965 (1973).

A proper analysis of the relevant statistics herein, as, for example, by application of standard deviation methodology as set forth in *Hazelwood*, *supra*, 433 U.S. at ——, 15 FEP Cases at 5, 6,[3] would tend to rebut any inference of discriminatory treatment in hiring. The statistical evidence indicates that the employer's overall hiring pattern did not "fall more harshly on one group than another." *Teamsters*, *supra*, 431 U.S. at 335-36 n. 15, 14 FEP Cases at 1519 n. 15. The court below failed to recognize the inference from this evidence as relevant in analyzing the allegation of disparate treatment. EEAC respectfully submits that the court's disregard of this inference was clear error. While such statistical inferences are less controlling in a non-class action than in a class action,[4] such evidence is, nevertheless, relevant in testing for discriminatory motive, proof of which is "critical" in cases of disparate treatment. *Id.*

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[3] *See Castaneda* v. *Partida*, 430 U.S. 482, 97 S. Ct. 1272, 1281 n. 17 (1977).

[4] Statistics, nevertheless, can have probative value in non-class actions. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805, 5 FEP Cases 965, 970 (1973); *Peters* v. *Jefferson Chemical Co.*, 516 F.2d 447, 450-51, 11 FEP Cases 296, 299 (5th Cir. 1975).

ARGUMENT

Relevant Statistical Proofs Must Be Given Appropriate Weight In Determining Discriminatory Impact and The Existence of Discriminatory Motive In Title VII Cases Alleging Disparate Treatment

It has long been recognized that in discrimination cases "statistics often tell much, and courts listen." *Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir.) *aff'd per curiam*, 371 U.S. 37 (1962). To be sure, "statistics are not irrefutable . . . their usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, *supra*, 431 U.S. at 340, 14 FEP Cases at 1521. In the instant case, however, the court of appeals ignored the usefulness of the proffered statistics and failed to consider the inferences of non-discrimination in hiring flowing from the statistical proofs.

A. *The Historical Role of Statistics in Discrimination Cases*

Statistical proofs originally gained currency in cases challenging discrimination with regard to the rights and benefits of citizenship such as jury participation,[5] voting eligibility[6] and public school attend-

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[5] *See, e.g., Neal* v. *Delaware*, 103 U.S. 370, 397 (1881); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hill* v. *Texas*, 316 U.S. 400 (1942); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Swain* v. *Alabama*, 380 U.S. 202 (1965); *Turner* v. *Fouche*, 396 U.S. 346, 359-60 (1970) (fourteenth amendment claim of jury discrimination—96% of those removed from jury lists as "unintelligent or not upright" were blacks).

[6] *See, e.g., Alabama* v. *United States*, 304 F.2d 583 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962); *United States* v. *Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

ance.[7] They were quickly accepted as "equally competent" in the litigation of cases under Title VII, 42 U.S.C. § 2000e, *et seq.*,[8] and other statutes prohibiting employment discrimination where justified by all of the surrounding facts and circumstances. *Teamsters*, *supra*, 431 U.S. at 339-340, 14 FEP Cases at 1520, 1521.[9] Although the role of statistics in cases alleging disparate impact was substantially clarified by the recent decisions in *Teamsters*, *Hazelwood* and *Dothard* v. *Rawlinson*, 433 U.S. ——, 15 FEP Cases 10 (1977), the decision below illustrates the considerable confusion attending the use of statistics in cases alleging disparate treatment. The Seventh Circuit chose to ignore the statistics and the findings of the district court, instead reasoning that the absence of hiring

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[7] *See, e.g., United States* v. *Hinds Cty. School Bd.*, 417 F.2d 852 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970); *United States* v. *Jefferson Cty. Bd. of Education*, 372 F.2d 836, 887 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

[8] *See, e.g., Barnett* v. *W. T. Grant Co.*, 518 F.2d 543, 10 FEP Cases 1057, 1061 (4th Cir. 1975) ("Statistics can in appropriate cases establish a prima facie case of discrimination, without the necessity of showing specific instances of overt discrimination"); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544, 550 (9th Cir. 1971), *cert. denied*, 404 U.S. 984; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 464-66, 472-74 (1973).

[9] For a complete discussion of the development and use of statistics in citizenship rights cases and thereafter in fair employment cases through the *Teamster* and *Hazelwood* decisions, *see* F. Morris, *Current Trends In The Use (and Misuse) Of Statistics In Employment Discrimination Litigation*, 5-36, Equal Employment Advisory Council, 1977.

discrimination "is not proved" by statistics showing protected class representation in an employer's workforce at a level comparable to or exceeding the class representation in the relevant labor market. This disregard for exculpatory statistical evidence is out of step with the recent decisions of this and other courts, and with the proposed Employee Selection Guidelines of the federal EEO agencies.

B. *Protected Class Parity or Overrepresentation in An Employer's Workforce vis-a-vis the Relevant Labor Market is Strong Evidence of Fair Treatment in Hiring.*

Contrary to the decision below, other courts have recognized the probative value of statistics showing a greater percentage of protected class members in an employer's workforce than in the relevant labor market. These courts attach weight to such statistical comparisons, inasmuch as an employer who intentionally discriminated against a protected class in recruitment and hiring would seldom have a workforce class representation exceeding the relevant labor market representation level. The following cases are illustrative of this careful evaluation of workforce figures presented to rebut claims of discrimination in recruitment, hiring or treatment.

Maldonado v. *Yellow Freight System, Inc.*, —— F. Supp. ——, 10 FEP Cases 1290 (C.D. Cal. 1976), involved a challenge to the employer's requirement that driver applicants possess a "special" driver's license. It was alleged that this requirement had a disproportionate effect on Hispanics. The court concluded otherwise however, as the statistical evidence revealed that Hispanics constituted 15.89% of the

civilian labor force in the appropriate area and 19% of the employer's total driver workforce. Similarly, claims of hiring discrimination in sales representative positions were rejected where 9.45% of the labor market was black and the employer had hired blacks for 21.74% of its sales representative positions during the relevant time frame. *Lightfoot* v. *Gallo Sales Co., Inc.*, —— F. Supp. ——, 15 FEP Cases 615, 620 n. 10 (N.D. Cal. 1977).

The *Maldonado* precedent is especially relevant, because Furnco's requirement that a fire bricklayer be able and competent was much like the certification of competency attested by the special driver's license. But in both of these instances, and in *Lightfoot* as well, the district courts found it significant that the percentage of protected class employees exceeded the protected class labor market representation.

In *Presseisen* v. *Swarthmore College*, —— F. Supp. ——, 15 FEP Cases 1466 (E.D. Pa. 1977), the plaintiff alleged, *inter alia*, disparate treatment of herself and women in general in recruitment and hiring for faculty positions. The plaintiff alleged that the college utilized the "old-boy network" in faculty recruiting and failed to advertise openings regularly. The alleged effect of these actions was to exclude women from the faculty recruitment and hiring process. The court found that evidence of such a procedure would be highly probative of disparate treatment "if coupled with evidence that Swarthmore hires very few women to be faculty members." *Id.* at 1495. But the court noted that "such evidence would be entitled to little weight if, notwithstanding the informal recruiting procedures, the College had a fair representation

of women on the faculty." *Id.* On the basis of this analysis and the facts presented, the court found that Swarthmore did not discriminate against women in recruitment or hiring.

An analogous individual Title VII complaint alleging discrimination against a black plaintiff was dismissed in *Winston* v. *Smithsonian Science Information Exchange, Inc.*, 437 F. Supp. 456, 15 FEP Cases 1280 (D.D.C. 1977). In ruling against the plaintiff, the *Winston* court took note of the fact "that there was a greater proportion of blacks in the SSIE work force than in the overall population." 437 F. Supp. at 472, 15 FEP Cases at 1294. On the basis of the "statistical presentation" and other evidence the court found it "not possible to conclude . . . that there has been disparate treatment of blacks. The statistics are consistent with a non-discriminatory, or at least a neutral, employment policy." *Id.*

The court below should have utilized the statistics relied upon by the district court herein in a similar fashion. Evidence showing that Furnco employed few minority employees would have provided substantial support for the conclusion that its informal hiring practices were discriminatory.[10] By the same token,

[10] Of course, such statistics would be subject to the tests identified in *Teamsters* which can show that such statistics actually lack probative force. These factors are:

(1) sample size (431 U.S. at 339-340 n. 20, 14 FEP Cases at 1521 n. 20);

(2) inapplicability of comparisons between an employer's workforce and the general population where the general population would not represent the pool of qualified applicants (*Id. Accord, Hazelwood, supra*, 433 U.S. at ——, 15 FEP Cases at 5 n. 13);

when the statistics showed a relevant overrepresentation of minority employees, they should have been recognized as substantial evidence tending to rebut the plaintiffs' prima facie case.[11] Paraphrasing *Presseissen* v. *Swarthmore* (15 FEP Cases at 1495), "such evidence would be entitled to [substantial] weight if, notwithstanding the informal recruiting procedures, [Furnco] had a fair representation of minority employees performing work on the Interlake project.

This conclusion gains support from the approach of the new Uniform Guidelines on Employee Selection Procedures (42 Fed. Reg. 65542 (1977)), currently being circulated for comments by the Equal Employment Opportunity Commission, the Department of Labor's Office of Federal Contract Compliance Programs, the Department of Justice and the Civil Service Commission. These Guidelines adopt what has been called the "bottom line" approach. This approach does not require an employer to validate any particular item in its selection process that appears to have an "adverse impact" [12] on a protected class if the

(3) lack of sufficient employment decisions by an employer to justify an inference of discrimination (431 U.S. at 360, 14 FEP Cases at 1529); and

(4) showing that a claimed discriminatory pattern is a product of pre-Title VII or time-barred actions (*Id.*).

[11] See *Jackson* v. *Nassau Cty. Civil Service Commission*, 424 F. Supp. 1162, 1168, n. 11, 14 FEP Cases 775, 780 n. 11 (E.D.N.Y. 1976) ("if the final result of the examination procedure does not evidence a discriminatory impact, cultural or racial bias in individual test items is irrelevant").

[12] In pertinent part, Section 4(D) of the proposed Guidelines defines "adverse impact" as:

employer's final hiring, promotion, etc., figures, (the bottom line figures), do not show an adverse impact, i.e., select a protected class at less than 80% of the rate for the group with the highest selection rate. Thus the proposed Uniform Guidelines state (Section 4(C)):

> If the information called for by § 4 A and B above shows that the total selection process for a job has no adverse impact, the Federal enforcement agencies will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and generally will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multi-

> D. A selection rate for any racial, ethnic or sex group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on racial, sex, or ethnic grounds. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.

This definition is substantially similar to that currently utilized in the Federal Executive Agency Guidelines on Employee Selection Procedures, 41 C.F.R. § 60-3.4(b) (1976). See Morris, *Current Trends*, *supra*, 50-52.

part selection procedure or any separate procedure that is used as an alternative method of selection. If a total selection process does have an adverse impact, the individual components of the selection process should be evaluated for adverse impact.

The rationale behind the current Federal Executive Agency Guidelines on Employee Selection and the proposed Uniform Guidelines is the same as the position enunciated by the court in *Presseisen* v. *Swarthmore*. This rationale is that employer selection practices which allegedly discriminate obviously do not do so where the employer's workforce shows an appropriate representation of protected class members. See cases cited *supra*, pp. 11-14.

This rationale is entirely consistent with the principles established on an analogous point in *Hazelwood*. In that case, the Court instructed that the lawfulness of the Hazelwood School District hiring practices could be tested by application of expected value theory. Citing the methodology previously explained in *Castaneda* v. *Partida*, 97 S. Ct. 1272, 1281 nn. 16, 17 (1977), a case alleging discrimination against Texas Mexican-Americans in grand jury selection, the Court applied standard deviation analysis. The Court stated in *Hazelwood* that a model could be set up to predict minority teacher hiring. Hazelwood's actual teacher hiring should fall within the vicinity of the predicted value if only random factors were at work. 433 U.S. at ——, 15 FEP Cases at 5 n. 14, 6 n. 17. Where the difference between the expected value and the observed number is greater than two or three standard deviations, the process would be suspect, i.e., an inference of discrimination would arise. See *Casteneda*,

supra, 97 S. Ct. at 1281 n. 17. *Accord*, *Hazelwood*, *supra*, 433 U.S. at ——, 15 FEP Cases at 5 n. 14.[13]

The present Federal Agency and the proposed Uniform Employee Selection Guidelines both utilize the "80% Rule" as the methodology for computing the expected value of protected class hires if only random (non-discriminatory) factors are at work, instead of standard deviation analyses. Under either analytical method, the important point, however, is that it is now well established that the courts should consider the minority employee workforce statistics for the very relevant light such statistics can shed on the determination of whether a selection process is discriminatory. And that is precisely the kind of careful statistical inquiry in light of "all of the surrounding facts and circumstances" [14] that the court of appeals refused to conduct. We respectfully submit that this Court should clearly establish the necessity of evaluating probative bottom line employment figures in determining whether or not an employer has engaged in disparate treatment. For bottom line statistics showing that an employer's workforce has met or exceeded the protected class labor force percentage are almost certainly inconsistent with any general discriminatory scheme and also tend to disprove allegations of specific discriminatory treatment.

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[13] Furnco's brief applies standard deviation analysis to the facts herein and demonstrates that under either the minority representation percentage of the district court or the court of appeals, the deviation from the expected value of blacks working on the Furnco job is less than one standard deviation.

[14] *Teamsters*, *supra*, 431 U.S. at 340, 14 FEP Cases at 1520-21.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the judgment of the Seventh Circuit should be vacated with instructions to reinstate the judgment of the district court.

Respectfully submitted,

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